No. 15828

United States
Court of Appeals
for the Ninth Circuit

WM. A. SMITH CONTRACTING CO., INC., a corporation, and WM. A. SMITH CONTRACTING COMPANY OF CALIFORNIA, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, Appellants,

vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN C. CURTIS and RACHEL CURTIS, a copartnership, doing business as Curtis Gravel Company, Appellees.

APPELLANT'S REPLY BRIEF

Upon Appeal from the United States District Court for the District of Oregon

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SUBJECT INDEX

INDEX OF AUTHORITIES

Table of Cases

TEXTS

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1. The sub-contract determines the obligations of the parties.

Both parties agree that the sub-contract dated June 10, 1951, (Def. Ex. 2), determines the respective obligations of the parties.

The sub-contract sets forth that Appellee Curtis carefully examined the general contract (Def. Ex. 1),

received all of the plans and working drawings, was fully informed of the location and nature of the work, of the cliamte, conditions, terrain, nature and size of the vegetation existing structures, location and general availability of water, fuel and power, the size, type and availability of equipment to perform the work and other matters affecting the cost of the work. Mr. Curtis visited the site and studied conditions before signing the agreement. (R. 61). In fact, Mr. Curtis testified that he was familiar with all of the terms of the general contract. (R. 66).

Mr. Curtis agreed, among other items, to perform Part B, Item 3 b, of the prime contract calling for furnishing of ballast material at a price of $2.20 per cubic yard. This section recites:

> "Estimated quantity, 56,000 cubic yards. The quantities listed above are estimates only. The subcontractor will be required to complete the work specified above in accordance with this contract and at the price or prices whether it involves quantities greater than or less than the above shown estimates . . ."

The above provision makes it clear that Curtis was obliged to provide all ballast necessary to complete the job. In Appellee's brief, Curtis seeks to avoid this obligation on the grounds that Curtis was not furnished with quantity requirements until after the original date was extended by change orders of the Army Engineers because of delays in site preparation by other contractors

and sub-contractors, which were not the fault of either Appellant or Appellee. Appellant did give Appellee timely notice of ballast requirements within the extended contract period as soon as site conditions permitted. (Def. Ex. 4-0, 5a, 5b).

It is obvious that large construction jobs in remote areas may entail delays. Such delays, without fault, are in the minds of the parties, and contractual provisions for them are quite customary. The prime contract contemplated them and contains provisions expressly governing extensions of time of performance. (Def. Ex. 1).

The sub-contract incorporates the provisions of the prime contract by reference in plain and unambiguous language. Section 19 of the sub-contract, (Def. Ex. 2), provides:

> "All provisions of the original contract and the specifications and working drawings are included as a part of this sub-contract the same as though written in full herein."

Curtis understood that the sub-contract incorporated the provisions governing extensions of time of performance set forth in the prime contract. Delays in site availability which were not the fault of Appellant or Appellee also precluded Appellee from the furnishing aggregate under Part A of the prime contract within the time originally specified in the contract. Nevertheless, Curtis continued to provide aggregate far in excess

of estimated quantities during the extended time for performance provided by change order. (Def. Ex. 8A).

Any other conclusions would not make business sense, and would make it difficult for contractors and sub-contractors to bid and perform large government construction contracts. Under these contracts, the United States requires that the prime contractor perform completely notwithstanding changes in specifications, extras changed conditions or requirements, and that allowances for any increases or decreases in a contractor's costs resulting therefrom be determined by the contracting officer for the government with provision for appropriate rights of administrative and judicial review. (Def. Ex. 1, Articles 3, 4, 5C, on pp. 3 and 4 of the prime contract). The business purposes of this clause are to avoid delays and to see that the government will not be stuck with high prices for changes or site delays during the course of the work with the only expensive alternative of bringing in another contractor and his equipment on competitive bid.

The same factors govern the relationships of the prime contractor and the sub-contractor who is performing parts of the prime contract. If the prime contractor were bound by blameless site delays with no recourse other than change orders extending the time of prformance, while the sub-contractor were free to walk off the job because of a government time extension for performance, the prime contractor would be at the

mercy of the sub-contractor with the same expensive alternatives which the government eliminated in the enumerated clauses of the prime contract. The very purpose of Section 19 of the sub-contract incorporating all provisions of the prime contract by reference is to put the sub-contractor, the prime contractor, and the United States government in the same position with regard to innocent delays and changes arising on the job.

The reference in the sub-contract to the provisions, the specifications and working drawings is plain and unambiguous. It was intended to and did incorporate by reference into the sub-contract all those provisions of the prime contract which might be applicable to the sub-contract which Appellee was obligated to perform. Appellee would have the Court believe that reference to the provisions of the general or prime contract was for a particular purpose only, and its citations of authorities are all concerned with the reference made in a sub-contract to the original contract for a particular and specified purpose. There is no such limitation in the case under consideration for it is obvious that the parties intended that the sub-contractor should be bound by all those matters and things contained in the prime contract by which the general contractor would be bound. The Court's attention is called to the language appearing in 12 Am. Jur. 781, Sec. 245, to the effect that:

> "Where a contract is executed which refers to another instrument and makes the conditions of

such other instrument a part of it, the two will be interpreted together as the agreement of the parties."

Myers vs. Strowbridge Estate Co., 82 Or. 29, 160 Pac. 135, and *Wallace vs. Oregon Engineering Co.,* 90 Or. 31, 174 Pac. 156, 175 Pac. 445, are both cases in which the contract referred to an unattached document for a specific purpose only and were thus so limited. Here the sub-contract specifically incorporates all conditions of the prime contract. (Def. Ex. 2, Paragraph 19).

2. The sub-contract was plain and unambiguous.

We submit that the contract is plain and unambiguous and apparently, Appellee has conceded that the alleged conversations at Pasco are not to be considered as evidence in this case, in the event that the sub-contract is plain and unambiguous.

A careful examination of the instrument leaves no room for doubt that notice of quantity requirements is not required. Had such notice been required, the sub-contract would have plainly so stated. Appellant acquainted himself with the project prior to the exceution of the sub-contract and was aware of the progress of Appellant's work and that the same was dependent upon the performance by other contractors of their commitments. The Army Engineers computed the theoretical quantity of ballast material to be used and so did Appellant. However, the Army Engineers specifically thrust the burden of determining actual quantity upon Appellant and the latter, in entering into the sub-contract, intended to and did transfer this burden of ascertaining quantity upon Appellee. Nevertheless, Appellee, shortly after beginning the manufacture of ballast, sought to shift this burden of determining quantity to Appellant; Appellee repeatedly, both orally and in writing, requested of Appellant the ultimate quantity of ballast material required. Many delays had occurred in the performance of the contract covering the entire project, and both Appellee and Appellant were

aware of the fact that ballast material could not then be applied. However, Appellant, seking to be helpful, made an honest and sincere effort to assist Appellee in making a determination, but could arrive at no conclusion and thus could not give Appellee the definite figure demanded at the time of the demand. (Pl. Ex. 2-a, R. 145-147. Appellee also sought to be relieved of the obligation of determining quantity on the ground that it was inexperienced in railroad work although the testimony indicates that Appellee had performed at least two ballast production contracts in connection with railroad work, one for the Milwaukie Railroad and one for the Corps of Engineers (R. 56). Appellant was experienced in railroad work, realized that the exact quantity of ballast material could not be determined in advance of the application, and it was for this reason that the contract between the parties did not provide for advance notice. (Def. Ex. 4-d, 4-g, 4-h, 32 and 33). It is interesting to note from Pl. Ex. 1, the transcript of testimony before the Claims and Appeals Board of the United Statest Army Engineers that the reason the applied ballast exceeded the theortical quantity by such a high percentage remains a complete mystery.

Appellee claims that custom and usage dictates that Appellant should give notice as to the quantities required, but to engraft such a provision in the contract by custom, one must find it to be "ancient, notorious, uniform, not opposed to a well settled rule of law, and

not inconsistent with the contract of the parties" *Port Investment Co. vs. Oregon M. F. Insurance Company,* 163 Or. 1, 94 Pac. 2nd 734; *Coxe vs. Heisley*, 19 Pa. St. 243, 25 C.J.S. 78. Appellee failed to prove that there was such a custom in existence at the time of the making of the contract as would meet the requirements set forth by the Oregon Court. Appellee's witnesses speak of their own experience but make no mention of universality of such a custom (R. 50, 78, 109-110). The witness Shotwell did not testify to any history of such a custom, did not state that it was common knowledge and did indicate by his testimony that a provision for notice was usually incorporated in the contract. (R. 78). He further stated that he had never produced ballast material for a railroad job. (R. 82). Appellee's witness Thompson, project Engineer for Appellee, speaks only of his own experience. (R. 109-110). He testified further that if he had known Appellant did not intend to notify Appellee of the quantity, that he would have then referred to the verbal agreement. (R. 114). If the alleged custom were so well known, why would he not have said that he would rely on custom? Is custom so soon forgotten that upon cross examination he would not have remembered the custom which he said he had found in his own experience? Nowhere in the testimony or in the exhibits does it appear that Appelle put any reliance upon the alleged custom. If such a custom existed and met the requirements, namely, that it be ancient, notorious and uniform, and if Appellee did in fact enter into the contract with the intention of incor-

porating such custom into the agreement, it seems apparent that some reliance would have been placed upon custom prior to the filing of the pleadings herein. One cannot find in the testimony any hint that Appellant had knowledge of such custom and there was no testimony to the effect that the custom was so general that Appellant could be presumed to have knowledge of it. "To hold a person bound by a custom it must be shown that the custom is so notorious as to affect him with knowledge of it and raise the presumption that he dealt with reference to it or else that he had actual knowledge of it." 55 Am. Jur. 282.

In *Pickley vs. United States* 46 Ct. Cl. 77, the contractor was employed to perform four jobs for the government and the latter's engineers were to select the points at which work would be done. The contractor was not employing a sufficient staff to do the job in question and the engineers delayed notification to him to begin a job. The government, at the hearing of the case, attempted to prove liability upon the part of the contractor to notify that he was ready to begin. The Court held that the custom could not be imported into the contract, stating that "a custom may be shown to explain a written contract where there is something to be explained. But where a contract does not require the contractor to give notice that he is ready to begin work, it cannot be imported into the contract by custom. *Ins. Co. vs. Wright*, 1 Wall 456, 470; *Barnard vs. Kellogg*, 10 Wall 383, 390, 2 Greenleaf on Evidence,

Sec. 251, 292."

If Appellee had been able to prove that there was a custom so notorious, general and ancient as to imply knowledge upon the part of the Appellant, such custom would still be of no avail as it is in contravention of the express or implied provisions of the written contract. *Port Investment Co. vs. Oregon M. F. Ins. Co.*, supra.

In the recent case of *Bliss vs. Southern Pacific Co.*, Or. Adv. Sheets, Vol. 66, p 285, at 288, we find the following language:

> "The rule is well settled that when a custom or usage is inconsistent with the plain and unambiguous terms of a contract, it cannot be interposed to contradict or qualify its provisions, for in such a case, as here, the terms of the contract are evidence of the intentions of the parties to avoid the effect of such usage or custom. 'It is sufficient ground for rejecting the custom that it is excluded by necessary implication.' . . . Custom, when available to a party, is used in evidence only as a means of interpretation of a contract and not for the purpose of importing new terms into it. *Barnard and Bunker vs. Houser*, 68 Or. 240, 243, 137 Pac. 227. If it were otherwise, Plaintiff's claim of custom and usuage would have the effect of giving him a tenancy in virtual perpetuity if sustained by prompt payment of an annual rental of $30.00."

It is assumed that a contract to purchase all re-

quirements for a certain job does not specify the actual quantity required for the reason that the buyer does not intend to assume the burden of predicting quantity. Obviously, price is based upon the questionable nature of the requirements. The Oregon Court, in the Port Investment Co. case, supra, set forth the rule at pp 20 and 21 to the effect that "it is also the law that even where a contract is indistinct and uncertain in its terms, it cannot be contradicted by usage: 17 C.J. 511, Sec. 77; *American Lead Pencil Company vs. Nashville C. and St. L. Railway*, 124 Tenn. 57, 61, 134 S. W. 613, 32 L.R.A. (N.S.) 323. It is sufficient ground for rejecting the custom that it is excluded by necessary implication: 27 R.C.L. 173, Sec. 20; *Shaw vs. Ingram-Day Lumber Co.*, 152 Ky. 329, 334, 153 S. W. 431, L.R.A. 1915D 145."

3. Ascertainment of quantity of ballast material.

Appellee contends it was Appellant's obligation to notify of quantity prior to the date upon which Appellee agreed to have furnished the ballast material, contending that in all conversations at Pasco in March or April of 1951, Mr. Huncke, one of Appellant's principals, made an oral commitment to give such notice. The alleged oral commitment was never mentioned in any letter or conversation and Appellant was never reminded of any oral commitment theretofore made. (R. 118-120). The Court's attention is again called to the fact that Mr. Huncke denied ever having made the alleged oral commitment.

Much is made of the completion dated of October 11, 1951, although ballast material was produced by Appellee until December 22, 1951. (R. 50). When inquiry was made as to why work did not cease on October 11, 1951, it was stated that "because the progress of work where the ballast to be used was delayed and there was no necessity of having ballast stockpiled by that date." (R. 50, 125). The crusher was maintained on the premises until late in March of 1952, (R. 122) and Mr. Thompson. the job superintendent of Appellee, who wrote the letter of April 5, 1952, (Pl. Ex. 2), testified that by his letter of April 5 1952 he was attempting to obtain an exact figure for the production of ballast.

Mr. Huncke testified that Appellant had no objection

to the dismantling of the plant so long as the obligation to produce requirements was met, that Appellant never insisted upon a crushing plant, that the obligation of Appellee was to furnish crushed stone in railroad cars and how Appellee went about performing its contract was really of no concern to Appellant so long as performance was obtained. (R. 135).

The record indicates that the subgrade was prepared by other contractors, the roadway shaping was performed by Appellee, that the roadbed topping, the next step in the progress, was performed by Appellee and that Appellant thereupon distributed ties and rails along the roadbed. After all this was accomplished, the ballast material was placed. (R. 150-152).

Appellee, whose duty it was to load the material into railroad cars furnished by Appellant, was on the job during all of this time and was familiar with the progress of the work. As Mr. Huncke testified, Appellee performed the roadbed topping job and Appellee was actually in a much better position to know the conditions of the subgrade than was Appellant. (R. 147).

We therefore find that Appellee was working at the job site during all of the activity. Mr. Thompson, the superintendent, was at the job site the entire time and Mr. Curtis was at the job site two or three days out of every ten days or two weeks. (R. 82).

The general provisions of the contract provide for

extensions of time. Appellee was acquainted with the fact that Appellant's progress of work was dependent upon Appellant's prompt performance, and, of course, by the prompt performance on the part of Appellee with respect to those parts of the contract which Appellee had undertaken to perform. Appellee well knew that the work was not progressing in accordance with the original schedule and had direct knowledge of the fact that Appellant was unable to assert with particularity the exact quantity of the ballast material to be produced, other than taking off a theoretical measurement which was the estimated quantity set forth in the prime contract. Appellee was actually familiar with all the terms of the general contract, (R.66) anticipated unforeseen difficulties, (R. 68).

Appellee contends that all the cases cited by Appellant concern situations in which the purchaser made his requirements known, but the seller failed to deliver the requirements. As a matter of fact, the cases cited by both parties with relation to this problem are cases in which the contract definitely provided that the supplier would be notified by the purchaser at particular intervals. In our case, however, the contract is silent, and does not provide for such notice. In 77 C.J.S. 908, Sec. 171, we find the following language:

> "A provision in the contract for notice of the buyer's requirements must be complied with. Such a provision, being for the sellers benefit, may be

> waived by him, but he can not waive the provision to the buyer's prejudice. Also, where a contract for the sale of articles during a specified period of time provides for advance notice by the buyer of the amount required, and no notice is given, but the seller visits the buyer's place of business from time to time in order to keep in touch with the latter's requirements, the buyer is not bound to pay for an amount in excess of his needs, which the from his own observation, without notice from the seller has manufactured on information supplied buyer."

Here the Appellee was as familiar with the conditions which would determine the amount of ballast to be manufactured as was the Appellant.

While the original completion date for the production of ballast material was October 11, 1951, change orders finally extended the time for performance of the contract to August 9, 1952. (Def. Ex. 8-a). Extensions of time for the perfomance of all parts of the work were made from time to time and Appellee was well acquainted with the fact that change orders were constantly being made extending the time for performance due to unavoidable delays, and it is obvious that Appellee's statement that the prime contract was extended without the knowledge of Appellee is without merit in view of his claim for extra ballast material.

The sub-contract, (Def. Ex. 2), provides at page 6 thereof that "should the contractor take over com-

pletion of this work, the expense of completion shall be deducted from any sums that may then be due or that may thereafter become due sub-contractor by virtue of this agreement."

4. Computation of claim for extra ballast material.

Appellant was obligated to procure the ballast at Springfield and to ship the ballast material from Springfield by Southern Pacific Railway to Jasper, and at Jasper, Appellant's own equipment moved the ballast material to the point where it was to be used upon the re-located portion of the railroad which Appellant had contracted to construct. It is sufficient to say that the parties intended that delivery should be made upon that portion of the railroad which was the subject of Appellant's contract and where the ballast material was to be employed.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed with respect to the two parts thereof from which this appeal is taken.

Respectfully submitted,

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